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In the

Supreme Court of the United States

..... Term, 1961

No. 577

LEROY ALPHONSO HAITH,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Supreme Court of the United States:

Petitioner, a citizen of the United States, petitions this Court for writ of certiorari directed to the United States Court of Appeals for the Third Circuit, to review the final judgment of that Court entered on November 1, 1961, which judgment affirmed and sanctioned the final judgment of the United States District Court for the Eastern District of Pennsylvania, which was a manifest departure from the usual and accepted course of judicial procedure, and on account thereof Petitioner verily believes an exercise of this Court's power of supervision is essential to the fulfillment of fundamental justice under the law.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed November 1, 1961)

By GOODRICH, *Circuit Judge.*

This is an appeal by the defendant from a conviction of conspiring to violate statutes relating to the manufacture, possession, and distribution of untaxed liquor. 26 U.S.C.A. §§5179(a), 5205(a)(2), 5222(a)(1), 5601(a)(4). The appellant makes three points. He says, first, that the record does not show the return of the indictment in open court; second, that the indictment does not afford a jurisdictional basis for his trial and conviction; and, third, that the evidence is not sufficient to sustain the conviction.

The first two points are raised for the first time on this appeal. They are, therefore, not open for consideration by this Court except in the very limited exception sometimes called the "plain error" rule. See *United States* v. *Pesano*, 293 F. 2d 229, 232 (2d Cir. 1961; *Nix* v. *United States*, 259 F. 2d 693 (5th Cir. 1958) (per curiam); *Stern* v. *United States*, 219 F. 2d 263 (4th Cir. 1955); *Mitchell* v. *United States*, 208 F. 2d 854, 857-58 (8th Cir.), *cert. denied*, 347 U. S. 1012 (1954); *Hannon* v. *United States*, 99 F. 2d 933 (3d Cir. 1938) (per curiam), *cert. denied*, 308 U. S. 594 (1939); *cf. United States* v. *Allegrucci*, 258 F. 2d 70 (3d Cir. 1958) (finding "plain error").

Even had these points been raised below, however, the result would be the same. It has been said earlier that "it need not . . . appear by any set form of phraseology that the grand jury appeared in open court and returned the indictment." *United States* v. *Glasser*, 116 F. 2d 690, 695 (7th Cir. 1940), *rev'd on other grounds*, 315 U. S. 60 (1942); see *Breese* v. *United States*, 226 U. S. 1 (1912).

In this instance the Clerk's Minute Sheet shows that the court was in session on June 2, 1960. It also shows that at 4:35 P. M. the grand jury returned with 18 true bills. On the first page of the original indictment there is a notation that it was filed June 2, 1960, and the last page is endorsed "a true bill" by the foreman of the grand jury. This is sufficient under the *Glasser* case. It would be better, even though not legally required, if the matter were somewhat more formalized in order to prevent the raising of this sort of question.

The defendant's second point is no better. He says that the indictment lacks definiteness and does not disclose the connection between the overt act and the conspiracy.

The indictment was a long one (seven pages) charging nineteen parties with the general conspiracy above mentioned. The overt act charged against the defendant, in the words of the indictment, was the following:

> "(g) Approximately three times a week, between November 1, 1959 and February 9, 1960, LEROY HAITH and JACQUELINE HAITH turned their automobile over to Lewis M. Hiatt, who took said automobile to Pitman, New Jersey, loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania, and accepted delivery of said automobile, so loaded, at points previously agreed upon by the parties."

We think an attack upon this indictment on the ground that it fails to tell the defendant what he is being charged with is not well taken. A reasonable interpretation of the language certainly charges him with being a party to the conspiracy and sets out very definitely his role in it.

The third question raised by the defendant is that the evidence is insufficient to sustain the conviction. He says, through counsel, that "nothing appears in the record whereby he would be informed that the party or parties he dealt with in buying illegal distilled spirits were directly selling and dispensing this commodity from a distillery." Here, too, we think the point is not well taken. The evidence showed that the entrepreneur in this transaction was a man named Kensil. There was testimony that the chief prosecution witness, Hiatt, met the defendant in November 1959 at a restaurant on the northbound lane of the New Jersey Turnpike. The defendant was alone on this occasion. He had a two-door Buick car with Virginia license plates and the testimony shows that the trunk of this car had been arranged to take more than an ordinary load of distilled spirits. Testimony showed that Hiatt told defendant how many cases of "goods" he had for him and informed him where to meet Kensil. Then Hiatt took Haith's car to a place arranged, loaded it with twenty six-gallon cases of spirits and drove to another restaurant on the southbound lane of the New Jersey Turnpike. There defendant got out of Kensil's car, entered his own Buick and drove southward on the Turnpike. This same arrangement continued, according to the evidence, for fifty or sixty deliveries between November and February. The liquor was unstamped. Defendant paid about $500 for each load but there was an adjustment, on some occasions, for breakage in the load before. In other words, this was a series of transactions with at least some amount of credit extended between the parties.

It does not matter whether each defendant in a conspiracy knows all about the doings of all the other defendants or not. *United States* v. *Sansone*, 231 F. 2d 887, 892-93 (2d Cir. 1955), *cert. denied*, 351 U. S. 987 (1956); *United States*

v. *Andolschek*, 142 F. 2d 503, 507 (2d Cir. 1944); 1 WHARTON, CRIMINAL LAW & PROCEDURE §83, at 179 (Anderson ed. 1957). This jury had enough testimony, if it accepted Hiatt's story, to conclude that the defendant was engaged in one portion of a rather elaborate and, for a time, highly successful enterprise in the making and selling of illicit liquor. Our own decision in *United States* v. *Giuliano*, 263 F. 2d 582 (1959) is a helpful comparison.

The case was carefully tried. Defendant took no objection to the instructions of the able trial judge.

The judgment of the district court will be affirmed.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

It is respectfully submitted that the Court below has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the departure of the District Court for the Eastern District of Pennsylvania from such proceedings as to call for an exercise of this Court's power of supervision.

On November 1, 1961, the opinion and final order of the United States Court of Appeals for the Third Circuit was rendered herein.

THE QUESTIONS HEREIN PRESENTED FOR REVIEW

(1) The record does not show the return of the indictment into open court by the grand jury and the fact recorded.

(2) The indictment did not afford a jurisdictional basis for trial, conviction and sentence of the Appellant.

(3) The evidence is insufficient to sustain the conviction and the district judge committed reversible error in refus-

ing to sustain the Appellant's motions for judgment of acquittal and, or new trial.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Appellant, Leroy Heath, was found guilty, by verdict of a jury rendered in the United States District Court, for the Eastern District of Pennsylvania, on January 26, 1961, and in consequence thereof was on June 14, 1961, sentenced to a term of imprisonment for a period of 3½ years and directed to pay a fine of Two Hundred and Fifty Dollars.

The indictment upon which appellant was convicted and sentenced charged that appellant and others did knowingly, and feloniously, conspire, confederate, and agree together and with each other and with persons unknown, to commit offenses against the United States, to-wit: to violate the Internal Revenue Laws relating to the manufacture of distilled spirits, and, that it was the plan and purpose of the conspiracy:

(a) To engage in and carry on the business of a distiller of distilled spirits, without giving bond, as required by law, with intent to defraud the United States of the tax on the spirits distilled by them; (Title 26 U.S.C. Section 5601(a)(4)).

(b) To possess and have in their possession and custody, and under their control, a still and distilling apparatus set up without registering the same with the Secretary or his delegate in the manner and form required by law; (Title 26, U.S.C. Section 5179(a)).

(c) To make and ferment mash fit for distillation and for the production of distilled spirits on premises other than a

distillery duly authorized according to law; (Title 26 U.S.C. Section 5222(a)(1)).

(d) To transport, possess, buy, sell and transfer distilled spirits in immediate containers which were not stamped by stamps evidencing the determination of the tax or indicating a compliance with the provisions of Title 26 U.S.C., Chapter 51; (Title 26 U.S.C. Section 5205(a)(2)).

The indictment further charged that in furtherance of the conspiracy and in order to effect the objects thereof the defendants did commit overt acts, and, the overt acts charged against the herein appellant, Leroy Haith in the indictment follows:

(g) Approximately three times a week, between November 1, 1959 and February 9, 1960, *Leroy Haith* and *Jacqueline Haith* turned their automobile over to Lewis M. Hiatt, *who* took said automobile to Pitman, New Jersey, loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania, and accepted delivery of said automobile, so loaded, at points previously agreed upon by the parties. See indictment App. p. 17.

The charge of the United States District Judge in so far as such charge pertains to the Appellants, see App. pp. 1-9.

Various motions for New Trial and Judgment of acquittal notwithstanding the verdict of guilty were made on behalf of the Appellant and overruled by the District Judge, see, App. p. 14.

The basis of such motions for new trial and acquittal was that the evidence as a matter of Law was insufficient upon which to predicate the conviction of the Appellant, Leroy Haith. See Opinion of the Honorable William Craft, District Judge, see App. pp. 10-14.

The Appellant, Leroy Haith, was found guilty by a jury in the United States District Court for the Eastern District of Pennsylvania, on the 26th day of January, 1961, upon Count One of an indictment, which charged that Haith and others conspired (1) To engage in and carry on the business of a Distiller without having given Bond as required by law; (2) To possess and control a Still and Distilling apparatus without legally registering the same; (3) To make and ferment mash fit for distillation on premises other than an authorized distiller; (4) to transport, possess, buy, sell and transfer distilled spirits in immediate containers not stamped to evidence the determination of the tax.

The case of the Government was built on the testimony of Lewis Hiatt, from which it appears that Eddie Kensil was the head of the unlawful operation, namely, for the manufacture of corn whiskey.

Hiatt went to the home of Kensil in Philadelphia, on or about October 20, 1959 and agreed to assist in the unlawful operation.

Thereupon, Hiatt, and Kensil's wife (Mamie) went to the Old Schmidt Farm, in Bucks County, Pennsylvania, in a Cadillac owned and operated by Kensil—the said Parties arriving at the Farm about Five p. m.

On the farm were a house, and a barn. In the barn were a "dubbler", and some vats and boxes that had mash in them. Some of the parties herein indicted were in the barn working, namely, Joyce Sumner, tightening hoops on a vat, Bert Smith, nailing tar-paper on the walls, Brown Janney taking boards off the wall in order to make mash boxes. In the garage part of the barn was mash in bags.

The parties returned to Philadelphia, whereupon Hiatt was given his instructions by Kensil as to the part he (Hiatt) would take in the unlawful operation; which con-

sisted—that he would pick up sand and glass once a day and convey such products to the Still in Bucks County,—also to take the finished product (corn-liquor) out and—to keep the place cleaned up. Mrs. Kensil advised Hiatt to listen to her husband, as she expressed it because, he knows "what he is doing."

Mrs. Kensil impressed upon Hiatt the fact, that he must be careful in his operations—in conveying products to and from the farm.

On the next day the aforesaid parties went back to the Farm in Bucks county in the same automobile, which was operated by Eddie Kensil, and, on this visit found the same parties making preparations for the operation of a distillery.

Before the end of October other equipment was installed, via, a "burner", electric wiring, etc.—and soon the finished product (corn-liquor) was being manufactured.

Soon after the distillery was turning out the finished product—Hiatt commenced his "Role" as distributor of the corn liquor, and soon made deliveries to Richie Ferraro, Dominic Sparagno, William Kelly, and George Wharton.

Hiatt, in November 1959, met (Appellant) Leroy Haith at Howard Johnson's Restaurant on the New Jersey Turnpike on the Northbound Lane right below the Mount Holly and Burlington exits.

Haith got out of his automobile, a 1959 Buick, with Virginia License Plates on it.

Thereupon, Hiatt informed Haith (who he had known as early as May or June, 1959) the number of cases of corn liquor he had for him and also told him where he could meet Eddie Kensil.

Haith remained at Howard Johnson's Restaurant, while Hiatt took his (Haith's) automobile and drove it to a drop and loaded it with corn liquor that he had taken from the still.

Soon Hiatt returned to Howard Johnson's Restaurant. He got out of Haith's car, which he had loaded with corn liquor at the "Drop". He put the keys under the mat. He saw Haith get out of Kensil's car. Then, Haith got into his automobile and proceeded South.

Thereafter up until February, 1960, Hiatt made fifty or sixty deliveries of corn liquor taken from the Still to Leroy Haith. On about thirty of these occasions, Jacqueline Haith, was with her husband.

In pursuance of a prearranged agreement, the parties would meet and Hiatt would take the Haith car, and, drive to a "Drop" in Pitman, N. J. and fill it with corn liquor taken from the distillery. Cars having been exchanged, Haith would drive Hiatt's car to a designed place of meeting and receive from Hiatt, his, Haith's car loaded with corn liquor.

On two or three occasions, the Appellant gave Hiatt approximately five hundred dollars. Hiatt always asked for a specific amount of money and always informed Haith of the number of cases he was giving him. Haith in turn would advise him of the number of bottles that had been broken in the previous trip and how many Hiatt owed him.

ARGUMENT

I.

The Record Does Not Show the Return of the Indictment Into Open Court by the Grand Jury and the Fact Recorded

In *Remigar* v. *U. S.*, Fourth Circuit, 172 Fed. 646, it is definitely held that the record must show that an indictment must be carried into open court in the presence of the Judge by the entire Grand Jury and the fact recorded.

The Court quoted with approval *Commonwealth* v. *Cawood*, 2 Va. Cases 541, decided 1825, as follows:

"The accusation in due and solemn form is as indispensable as the conviction. The bill of indictment is sent or delivered to the Grand Jury, who after hearing all the evidence adduced by the Commonwealth, decide whether it is a true bill or not. If they find it so, the Foreman of the Grand Jury endorses on it 'A True Bill,' and signs his name as Foreman, and then the bill is brought into Court by the whole Grand Jury, and in open Court it is publicly delivered to the Clerk, who records the fact. *It is necessary that* it be presented publicly by the Grand Jury, that is the evidence required by Law to prove that it is sanctioned by the accusing body, and until it is so presented by the Grand Jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented.

"The circumstance that the bill is endorsed a true bill and signed by David Campbell, foreman, affords no record proof that the bill was found by any Grand Jury, nor particularly by this Grand Jury. That gentleman might have been frequently the foreman of other Grand Juries in the same Court, and, though we know as men that he would not sign any paper as foreman without being really so, yet as Judges we must require record proof that he was authorized by the Grand Jury of which he was Foreman to make the endorsement now before us, and that he presented it in their presence in open Court as the accusation against this individual."

We see that it is essential to the validity of a conviction that the entire Grand Jury return an indictment into open Court in the presence of the Judge, and that the fact be recorded.

It could not be presented by the foreman or the whole Grand Jury to the Clerk of the Court in the absence of the Judge.

The Fourth Circuit in *Renigar* v. *U. S.*, *supra*, quoted with approval the following from *State* v. *Bordeau*, 93 N. C. 563:

> "We believe a lose practice prevails in many of our Courts with respect to the returns of bills of indictment into Court by the Grand Jury. It is often the case that bills are carried into Court by the foreman alone, but this is a practice to be condemned because it is not the legal mode of proceeding. The law requires that the Grand Jury should make their returns in a body that the Court may see that they as a body assent to the returns made."

The Fourth Circuit further said in *Renigar* v. *U. S.*, *supra*, as follows:

> "The Foreman is not the representative of the Grand Jury. He is authorized to speak for it in its presence, when called on by the Court to say whether the Grand Jury has any presentments to make. Any other rule would put it in the power of an individual who happened to be foreman of the Grand Jury to gratify personal or other malice by presenting in the form of an indictment for an infamous offense a person innocent of all crime, and subject him to the annoyance, expense, and infamy attendant upon such accusation.
>
> "It is not enough to say that such a thing is improbable; that it is possible is sufficient reason for adhering to those rules which have the sanction of time and immemorial usage."

The docket entry of June 2, 1960, states in respect to the indictment returned in the case of the Appellant merely the words "True Bill". See App. p. 1.

The minutes of the Clerk of June 2, 1960, limits its language, to the following, to-wit: 4:30 p. m. "Grand Jury returns with 18 true Bills." See App. p. 28.

Whereas there is a great difference between docket entries, minutes, and the Record—however we submit that even such loose matter as minutes and docket entries, do not show that the Grand Jury returned into open Court and presented an indictment for conspiracy against Leroy Haith. Nowhere in the Record or Quasi Record, does it appear that the Grand Jury returned the indictment herein in open Court as a "True Bill" against the Appellant. It is mandatory that such procedure take place and that such fact be recorded by the Court.

Clearly, the record in the case of this Appellant does not include the steps of procedure in a criminal case essential to a valid conviction and sentence under the rule as set out in *Pointer* v. *U. S.*, 14 S. Ct. 410

II.

The Indictment Did Not Afford a Jurisdictional Basis for Trial Conviction and Sentence of the Appellant

Clearly, the indictment does not charge a crime against the herein Appellant, Leroy Haith.

It will be noted by inspection of the pleading that it charges that Haith and others did knowingly conspire and confederate, and agree together and with each other to violate the Internal Revenue Laws relating to the manufacture of distilled spirits, and, that it was the plan and purpose of the said conspiracy:

(a) To engage in and carry on the business of a distiller of distilled spirits, without having given bond, as required by law, with intent to defraud the United States of the tax on the spirits distilled by them. (Title 26 U. S. C. Section 5601(a)(4)).

(b) To possess and have in their possession and custody, and under their control, a still and distilling apparatus set up without registering the same with the Secretary or his delegate in the manner and form required by law. (Title 26 U. S. C. Section 5179(a)).

(c) To make and ferment mash fit for distillation and for the production of distilled spirits on premises other than a distillery duly authorized according to law. (Title 26 U. S. C. Section 5222(a)(1)).

(d) To transport, possess, buy, sell, and transfer distilled spirits in immediate containers which were not stamped by stamps evidencing the determination of the tax or indicating a compliance with the provisions of Title 26 U. S. C. Chapter 51 (Title 26 U. S. C. Section 5205(a)(2)).

It will further be noted that the indictment charges that in furtherance of the said conspiracy, and in order to effect the objects thereof, the defendant did do and commit several overt acts.

And the only attempted charge of overt acts against Leroy Haith, is as follows:

> (g)—Approximately three times a week, beginning between November 1, 1959 and February 9, 1960, Leroy Haith and Jacqueline Haith turned their automobile over to Lewis M. Hiatt, who took said automobile to Pitman, New Jersey, loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania, and accepted delivery of said automobile, so loaded, at points previously agreed upon by the parties.

Therefore, the indictment charges the unlawful combination, and the alleged conspirators agreed plan, was namely,

to violate four Federal Statutes relating to the illegal manufacture of distilled spirits—the last statute set out in the indictment wherein it was alleged defendant intended to violate the law had generally to do with the dispensing of the unlawful finished product, whereby, the unlawful common enterprise would be successful, via, selling the manufactured goods.

It was the contention of the Government that Haith on account of committing the above overt act, apparently, from the evidence committed beyond the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, most likely in New Jersey, thereby joined the common enterprise, whereby, all overt acts of others charged, become the acts of Haith, and the alleged plans of others charged also became the acts of Haith—also that the overt acts of Haith brought the venue of the entire conspiracy to the place where he committed the overt acts. Under such circumstances venue to try the cases rested in the United States District Court for either Pennsylvania or New Jersey.

It was the contention of the Government and established by the evidence that Haith took no part in the conspiracy except committing the overt acts set out in the indictment.

Therefore, under such circumstances, it became necessary that the indictment show on its face the overt act or acts of Haith with all definiteness and certainty as any other jurisdictional fact and it should have been made to appear from the indictment itself that there was a connection between the acts done by Haith and the plan of the conspirators. Notice, the cardinal requisite of due process, demanded that the draftsmanship of the indictment prescribe to the foregoing rules of pleading, where the liberty of the individual was involved.

To consider otherwise would be to assume that Appellant, Leroy Haith, was guilty of being a party to the conspiracy alleged in the indictment and that he thereby acquired full knowledge of the unlawful combination and that on this account the Government was excused from informing him of the nature and cause of the accusation against him.

Had the indictment attempted to charge a substantive crime against Haith, and omitted an essential element of the crime so attempted to be charged, then, the indictment would have been a nullity. *Aderhold* v. *Schlitz*, 73 Fed. (2d) 381; App. of *Hess*, 288 Pac. (2d) 5; *Dawes* v. *Gooch*, 170 Fed. (2d) 296; *Mackay* v. *Miller*, 126 Fed. 161; *State* v. *Skeen* (W. Va.), 74 S. E. (2d) 413.

There is no difference in principle here. If, the indictment attempts to charge a substantive offense denounced by law, and, through inadvertence or otherwise a component element of the crime is omitted, then, immediately upon inspection of the pleading, its invalidity is apparent—however, in the indictment now before us for consideration we do not observe that it is fatally defective at first glance, but, upon observation of the evidence its invalidity is manifest.

Nothing in the recitals in respect to the overt act render the slightest implication by virtue of which Haith would be informed that he joined the conspiracy set out in the indictment—such recitals are wholly insufficient to advise Haith that by his very acts he joined the common enterprise.

Further, the language used in the recitals concerning the overt act on Haith's part do not link him to the other allegations of conspiracy set out in the indictment, because, such overt act merely charged the sale or transfer of the distilled spirits from one defendant to the other.

It is said in *Norris* v. *United States*, 3rd Cir., 34 Fed. (2) 830:

> "The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity" (citing cases).

In numerous cases wherein a conspiracy is charged it is not essential that the indictment set out the overt act of a defendant with sufficient clarity as to thereby inform him that by such act he joined the common enterprise.

In *Marron* v. *United States*, 8th Cir., 8 Fed. (2d) 251, the Court said:

> "Nor is it essential that the indictment should show a necessary or logical relation of the overt act to the conspiracy. It is sufficient if the indictment charges that the act had for its purpose the furtherance of the unlawful scheme."

If Haith was not guilty of the overt acts charged, then, and under such circumstances, the other parts of the indictment were a closed book to him, and, afforded him no notice of any nature or character.

It was jurisdictional that the overt act or acts of Haith be clearly and distinctly set out and described by recitals in the indictment and to such a degree and extent wherein he would be sufficiently informed that the commission of such act or acts on his part would unquestionably tie him to the conspiracy alleged.

Evidently, the draftsman of the indictment intended to aver that Lewis M. Hiatt, delivered the automobile of the Haiths back to the said Haiths, after loading it with dis-

tilled spirits, but, his intent can only be construed by scrutiny of the verbiage he used, and he definitely and unequivocally states that the Haiths turned their automobile over to Lewis M. Hiatt, and that Hiatt took said automobile to Pitman New Jersey, and loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania and that *Hiatt* accepted delivery of automobile so loaded, at points previously agreed upon by the *parties*.

"Parties" can only mean, Lewis M. Hiatt, and some unknown party or parties, who were present at Pitman, N. J. at the point where the automobile was loaded with distilled spirits, (Hiatt, leaving the automobile temporarily at the place he loaded it or had it loaded with distilled spirits, and, gave instructions to parties at such place later to deliver it so loaded to him (Hiatt) at some other place).

The indictment definitely alleging that Hiatt was the actor in accepting delivery,—violence would be done to the verbiage to place a construction on the language, implying that the Haiths received the automombile loaded with distilled spirits. The indictment as to the overt acts can only be construed as beforehand set out, or, declare that the language, used to aver the overt acts is unintelligible was meaningless and incapable of application and thereby void. *Jones* v. *State*, Texas, 40 S. W. 250; *Patterson* v. *U. S.*, 29 Fed. 775.

Even, if the indictment be construed to sufficiently allege that Hiatt delivered the untaxed distilled spirits, to the Appellant, after his trip to Pitman, N. J., still, the recitals relating to the overt act would be totally insufficient, to charge or constitute an averment informing Haith that he was a party to the conspiracy alleged in the indictment, and, by the overt acts alleged joined the conspiracy.

From the recitals on the face of the indictment, no allega-

tion is made that Haith knew that the untaxed distilled spirits delivered to him by Hiatt were made, produced, or manufactured at the still located on the Old Schmidt Place in Bucks County, Pennsylvania, or Hiatt was making deliveries of illegal spirits as an agent for the operators and owners of the still described in the indictment—or that Haith knew that Hiatt was delivering untaxed distilled spirits to him from any manufacturer of illicit liquor—the recital says: "produced at the illicit distillery on the Old Schmidt Place"—from the face of the indictment the distilled spirits delivered from Hiatt to Haith may have changed hands many times since being manufactured or produced at the distillery on the Old Schmidt Place. As far as Haith was informed by the pleading, Hiatt, may have sold him distilled spirits of which, he (Hiatt) was the sole owner. As far as Appellant was informed from the recitals Hiatt may have acquired the spirits by theft, or hijacking. The recitals do not aver that even Hiatt knew that the spirits he delivered to Haith were manufactured at the still described in the indictment.

Such class of cases as *Marron* v. *United States*, *supra*, are cases where the jurisdiction is founded upon the conspiracy in chief rather than predicating consent of a defendant to enter the common enterprise solely upon his actions relative to an act that he committed.

The *sole* matter wherein it is attempted to link the Appellant, Leroy Haith, with the conspiracy charged in the indictment, is the overt act on the part of Haith, and, under such conditions; therefore, it becomes essential that the indictment should show on its face a necessary or logical relation of the overt act to the conspiracy.

Anything less would do violence to fundamental due process, because, where the jurisdiction of the Court depends

solely on an overt act alleged in an indictment for conspiracy, it must be alleged, with all the definiteness and certainty as any other jurisdictional fact.

In *Tillinghast* v. *Richards*, D. C. Rhode Island, 225 Fed. 226, the indictment returned by a Grand Jury in the Southern District of New York charged a conspiracy to defraud the United States by removing oleomargarine from the factory in Providence, Rhode Island without payment of the tax thereon. It was alleged in the indictment that defendants purchased "palm oil" in the Southern District of New York —an act within itself not necessarily showing that there existed a logical relation of the overt act to the conspiracy, whereupon the Court said:

> "Jurisdiction of the New York Court to try the petitioners for the offense alleged in the indictment must rest either upon the fact that the conspiracy was either formed in the Southern District of New York, or upon any overt act, or to use the language of Section 37 'any act to effect the object of the conspiracy' done in the Southern District of New York, by one or more of the conspirators. As the objects was to defraud the United States at Providence Rhode Island by means of removing from the factory at Providence oleomargarine upon which the tax had not been paid; anything which merely effects the object of manufacturing the taxable commodity cannot be regarded as an act to effect the object of the conspiracy. Before the Commissioner it seems to have been assumed that the indictment did in fact charge the doing of overt acts in New York. This assumption seems erroneous. The Brief of petitioners shortly and without elaboration, now makes the point that purchase of palm oil is merely, 'an adventitous circumstance, in no way essentially related to the alleged criminal purpose or its execution. Jurisdiction may be founded upon an overt act, as the hiring of a post office in pursuance of a plan for there

is an apparent connection between the act and the offense. See Brown v. Elliott, 225 U. S. 392; 32 S. Ct. 812. It would be quite another thing to allege for example, in this case, the hiring of a Post Office as an overt act, for this would be in no apparent connection with the alleged plan.

First, where the indictment charged conspiracy to defraud the United States by removing oleomargarine from the factory at Province, Rhode Island without payment of the tax thereon, allegations that the defendants purchased palm oil in the Southern District of New York were too uncertain to render the indictment subject to construction."

In the foregoing case the Court further said:

"Since the decision in Hyde v. U. S., 225 U. S. 347; 32 S. Ct. 793, and Brown v. Elliott, 225 U. S. 392; 32 S. Ct. 812; however, I am of opinion that U. S. v. Donnell Beatchef, 168 Fed. Cases No. 14,983, which was decided when the law was understood to be that the overt act was not a part of the offense and not a jurisdictional fact, and cases which have not followed it are of doubtful authority. Where the overt act and the conspiracy are in the same place, local jurisdiction may rest entirely upon the conspiracy. Where, however, the jurisdiction of the court depends *solely* upon the alleged overt act (see Brown v. Elliott, 225 U. S. 392; 32 S. Ct. 812), it must be alleged with all the definiteness and certainty of any other jurisdictional fact and certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the plan."

In *Williams* v. *State*, 182 Pac. 718, 16 Okla. Cr. 217, the Court said:

> "The law considers that wherever they act they renew, or perhaps, to speak more properly, they continue their agreement; and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. The Conspiracy alleged was to procure the crime of abortion. In order to constitute the crime of abortion the woman, Maude Marshall must have been pregnant at the time the alleged overt acts were committed in Greer County. Where the statute make pregnancy an essential element of the offense; it must be alleged and proven, and where the jurisdiction of the Court depends *solely* on an overt act alleged in the information for conspiracy to commit a crime, it must be alleged with all the definiteness and certainty of any other jurisdictional fact, and the connection between the overt act and the conspiracy charged must be made to appear specifically by necessary recitals."

In *U. S. v. Baker*, D. C. Rhode Island, 243 Fed. 741, the Court used the following language:

> "It may be said however, that many of the paragraphs, as for example 2-8 inclusive, contain allegations that certain property 'was thereafter concealed' from the Trustee, which are wholly ineffective, since it is not alleged that the concealment was by the defendants; and this is not cured by introductory allegations, since they are not 'acts mentioned in connection with the several names'. The effect is to reduce these to allegations merely of the purchase of cattle; they are entirely ineffective as allegations of acts of concealment of cattle and money."

The foregoing case involved alleged overt acts to be done in pursuance of and to carry out the objects of a conspiracy to conceal property that belonged to the Trustee in Bankruptcy

III.

The Evidence Is Insufficient to Sustain the Conviction and the District Judge Committed Reversible Error in Refusing to Sustain the Appellant's Motions for Judgment of Acquittal and/or New Trial.

Even if the evidence is sufficient as a matter of law to establish that the Appellant, Leroy Haith, united in a conspiracy with Lewis M. Hiatt, and, Eddie Kensil, then, we are faced with the Question—What was the scope and extent of such conspiracy and illegal venture as far as the appellant is concerned?

We observe that Count I of the Indictment, the count upon which Haith was found guilty by the Jury and sentenced by the Court charged that the plan of the conspirators was to (1) to engage in and carry on the business of a distiller without having given the bond required by law; (2) to possess and control a still and distilling apparatus without legally registering the same; (3) to make and ferment mash fit for distillation on premises other than an authorized distillery; (4) to transport, possess, buy, sell and transfer distilled spirits in immediate containers not stamped to evidence the determination of the tax.

In its opinion the Trial Court said:

> "In the entire context of the circumstances, the inference is irresistible that Kensil was present in connection with the transfer of the liquor and that Haith knew it. Haith thus knew of an illegal combination to possess, transfer, and sell, untaxed spirits.

If Haith did in fact know that Hiatt and Kensil jointly transferred the liquor to him, then, and under such conditions, he would probably be guilty of a conspiracy to violate

the provisions of Title 26 U. S. C., Sec. 5205(a)(2), dealing with possession and purchase, and transfer of distilled spirits in immediate containers not stamped to evidence the determination of a tax, but we contend that such guilt on his part would not of itself make him guilty of the conspiracy alleged in the indictment, to-wit: to illegally manufacture distilled spirits namely, (a) to engage in and carry on the business of a distiller without having given the bond required by law, (b) to possess and control a still and distilling apparatus without legally registering the same, (c) to make and ferment mash fit for distillation on premises other than an authorized distillery.

Now was the Appellant guilty of a conspiracy to violate the three foregoing Sections of Federal Law directly pertaining to the illegal manufacture of Liquor, or, was the conspiracy of which he was guilty limited and restricted in its area and scope, to a plan and intention merely to conspire with Hiatt and Kensil to violate the law relating and pertaining to transportation, possession, purchase, sale and transfer of distilled spirits in immediate containers not stamped to evidence the determination of the tax?

The Court below in its opinion says:

> "Haith knew of the existence to violate the Internal Revenue laws relating to distilled spirits, and knew under the evidence, that Hiatt and Kensil were parties to it. It was not necessary, in order to make Haith a participant therein, that he know the identity or number of his confederates, or their precise functions. It was enough that he know the central aim and objective of the confederation, and that he join therein." See opinion of Ct., App. p. 13.

It seems from the foregoing that the Trial Judge decides that whereas Haith knew that he was uniting in a conspiracy

with Hiatt and Kensil that had for its object violation of the Internal Revenue Laws pertaining to sale, purchase, etc of illegal distilled spirits, and whereas pecuniary gain by virtue of sale, constituted in the language of the District Judge, the central aim of the conspiracy of which Hiatt and Kensil were members that then under such limited circumstances Haith became a member of a conspiracy involving the illegal manufacture of illegal liquor even if he did not know that the scope of the conspiracy of which Hiatt and Kensil were members included within the ambit of its activities manufacture of illegal liquor.

It seems from the foregoing language that the Trial Judge decides and determines that because Haith purchased illegal liquor from Hiatt and Kensil, and thereby joined in a Conspiracy with the said vendors of illicit commodity in violation of Federal Law, that it followed as a matter of course that he also, became a member of a conspiracy involving violation of Federal law relating to manufacture of illegal distilled spirits; if in fact Hiatt and Kensil were members of a conspiracy that had as one of its objectives violation of the Internal Revenue Law pertaining to the manufacture and production of illicit liquor. And that his (Haith's) membership in such extended conspiracy was acquired even if he did not know that the illegal activities of Hiatt and Kensil embraced a conspiracy to manufacture illegal distilled spirits.

In other words the District Judge in his opinion holds when Haith as transferee received illegal liquor from Hiatt and Kensil as joint transferors of such product; although, he (Haith) had no knowledge that the activities of Kensil and Hiatt, extended to a conspiracy to illegally manufacture liquor, nevertheless he, Haith (having no knowledge of the extension of the unlawful enterprise), yet became a member of such extended undertaking.

The District Judge in his Opinion asserts:

> "It was not necessary, in order to make Haith a participant therein, that he know the identity or number of his confederates, or their precise functions. * * * It was not a sine qua non that he know the exact source of the alcohol so long as that source lay within the known general design and purpose". See Opinion of District Court, App. p. 13.

We agree that it was not necessary that Haith, in order to join the conspiracy as set out and described in the indictment; know the identity or number of his confederates, or their precise functions.

Also, Haith would not have to know the exact source of the Alcohol sold or transferred to him by Kensil and Hiatt, in order to become a party to a conspiracy having within its scope and purpose and the manufacture of illegal liquor, provided he knew that Kensil and Hiatt were parties to such conspiracy to manufacture liquor illegally, and that the liquor they sold or transferred to him, was produced and manufactured as a finished product by members of such conspiracy.

The foregoing principle is fully set out in *Jezewski* v. *U. S.*, 6th Cir., 13 Fed. (2d) 500, wherein the Court said:

> "If this testimony is true, it is wholly unimportant whether the saloon keepers of the Police Officers actually knew where the distributors were obtaining this Beer, or whether the manufacturers of the Beer knew to whom the distributors were selling it or whether these several groups were all or in part strangers to each other. They were each and all engaged in a common unlawful purpose, and each and all contributed their part to the furtherance of the unlawful purpose of the continuing conspiracy initiated by these distributors, if they were not in fact original parties to it."

In the foregoing case conviction was secured against, the manufacturers, purchasers, etc. for conspiracy to violate Title 2, Section 10138½ of the National Prohibition Act, which prohibited selling, possessing, for sale, bartering, soliciting, or receiving orders for sale of intoxicating liquors.

The Company of Haverman, Ross, and Friedman, doing business under the firm name of National Products Company had a permit to manufacture beer containing an alcoholic content far in excess of that permitted under the law, and were required to dealcoholize the beer to such degree that its alcoholic contents were brought down to the legal requirement before the beer was released from the Brewery.

Members of the aforesaid Brewery conspired with parties who agreed to act as distributors whereby such distributors would secure customers (saloon keepers) who would purchase the Beer from the said manufacturers wherein the manufactured product would not be dealcoholized. Police Officers entered the conspiracy agreeing to afford "Police Protection" to the Saloon keepers.

For the carrying out of the object of such conspiracy, saloon keepers were secured by the distributors who bought the beer from the beforehand mentioned brewery; wherein the distributors acted as agent both for the manufacturers and the purchasers, resulting in the delivery of the illegal beer from the manufacturers to the purchasers for retail sale in their respective establishments.

It is apparent from reading the foregoing case due to the surrounding circumstances that the saloon keepers knew that they were buying the illegal beer directly from some manufacturer of the illegal product, and, that the Police rendering protection, were aware of the fact that the saloon keepers received the beer which they were selling to customers directly from some Brewery.

Also it was not essential to constitute a conspiracy had as its purpose violation of the foregoing Section of the National Prohibition Act that the Seller be a manufacturer.

However, the District Judge in the case of the Appellant, was clearly in error when he held that illegal liquor bought from parties knowingly acting directly in behalf of parties operating an illegal distillery pursuant to a plan and conspiracy to violate the Internal Revenue Act by manufacturing illegal liquor became parties to a conspiracy to illegally manufacture liquor, although they did not know they were buying directly from those actually and constructively operating an illegal distillery; and did not know that the scope of the conspiracy of the sellers included a conspiracy to manufacture illegal liquor.

As far as Haith knew the liquor sold or transferred to him by Hiatt and Kensil on the first occasion (if in fact the evidence shows Kensil a party to the sale) plus all the illegal distilled spirits transferred to him by Hiatt on the different occasions between November, 1959, and February, 1960, may have been purchased by Hiatt and Kensil or either of these parties from operators of an illegal distillery under such circumstances, whereby all right, title and interest became vested in the purchasers. If, in fact such had been the case, the purchase of illegal liquor by Haith would not have the slightest tendency to promote and advance the business of those engaged in the operation of a distillery; but would only promote the interest of the sellers.

As far as Haith knew of the illegal liquor he received may have been smuggled by the party or parties selling such illegal commodity to him.

As far as Haith knew the illegal distilled spirits he received may have been acquired by the seller or sellers by larceny, by one act of larceny of several acts of larceny.

For all Haith knew the liquor he received may have been acquired by Hiatt and Kensil, or either of these parties by what is commonly described as hijacking.

Therefore, it was just as reasonable for Haith to believe that the seller or sellers of the illegal liquor to have acquired the liquor in any one of the above ways, as for him to believe that the seller or sellers of same were members of an existing conspiracy having as one of its objects the illegal manufacture of liquor and that they were dispensing the liquor he received from a still operating in accordance with said unlawful enterprise.

Where a defendant does not know the extent or scope of a conspiracy he does not become a member of the conspiracy in respect to its scope thereof of which he had no knowledge.

In *U. S.* v. *Addolshek*, 2nd Cir., 142 Fed. (2d) 503, said:

> "Upon the new trial the question may once more arise which Herskowitz raises now: i.e. whether he can be convicted of the same conspiracy in which Ward Nagel and the other Inspectors were parties.
>
> The argument as we understand it, is that since most, if not all of the others accused were employed in the "Permissive Section" while Herskowitz was employed in the "Enforcement Section," he could not have been a party to their conspiracy. The Inspectors in the "Permissive Section" examined only the Books and dealings of "Permittees", and those in the "Enforcement Section" confined their examination to the customers of "Permittees".
>
> Prima facie, these groups had nothing to do with each other, and if one group took bribes from "permittees" and the other from customers, quite independently and without mutual connivance, there was no conspiracy common to all. It is true that at times Courts have spoken as though A makes a criminal agreement with B, he becomes a party to any conspiracy into which

> B, may enter or may have entered with third persons. This is of course an error, the scope of the agreement actually made always measures the conspiracy, and the fact that B engaged in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity or even the number of his confederates, when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its contents and membership, so be it that they fall within the common purpose as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them. Upon a new trial if it shall appear that Herskowitz in fact supposed there was only a limited plan or scheme and that it did not include Inspectors of the "Permissive Section" he will not be proven to have been a party to the conspiracy laid in the Indictment, and it will therefore be a variance".

The case of the appellant is clearly governed by the case of *United States* v. *Crimmins*, 123 Fed. (2d) 271, wherein Judge Hand said:

> "Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.
>
> "In the case at bar it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been, he could have been found guilty of the conspiracy, for such an agreement

would have dealt with the place of the theft, even though it did no more than provide that the place made no difference. A continued indifference to the source of the bonds, coupled with knowledge that in some cases they had come from beyond the state, would have been evidence of such agreement. But that was not the situation; so far as appears, Crimmins had no reason to suppose that any of the bonds he bought had been stolen in other states, and the place of their theft was not an implied term between him and the seller, not even to the extent of expressing his compliance; the conspiracy simply did not include that element of the crime. The jury might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make."

The District Judge in his opinion commented:

"Great reliance is placed on Kotteakos v. United States, 328 U. S. 750; wherein defendants were indicted for a single general conspiracy to violate the National Housing Act by inducing lending institutions to make loans which would be offered to The Federal Housing Administration for insurance on the basis of false and fraudulent information. The evidence, however, proved eight or more different conspiracies by separate groups of defendants which had no connections with each other except utilized one Brown as a broker to handle fraudulent applications.

Kotteakos is clearly not in point. The evidence here does not prove one conspiracy to produce illicit spirits and a separate, distinct conspiracy to distribute them, with no connection between them except Hiatt's presence with each group. Production and distribution were not independent and unconnected ventures, but interdependent and complementary steps in a single, integrated

and overall enterprise to violate the law." See Opinion of the District Judge, App. p. 14.

This is not a case like *United States* v. *Bruno*, 2d Cir., 105 Fed. (2d) 921, wherein a conspirator by reason of the unlawful act he voluntarily commits, is thereby clearly informed by the attendant circumstances, that such act of his is merely a link in a general unlawful undertaking.

Under such circumstances he foresees the entire scope of the unlawful enterprise.

The foregoing quoted language of the District Judge does not have application to the facts in the case of Appellant.

It is not the contention of this Appellant that there were two conspiracies and that Hiatt was a member of each group.

There was only one conspiracy of which Kensil and Hiatt were members, and the plan and purpose of such unlawful enterprise was to produce, manufacture, and dispense distilled spirits in violation of Federal Law.

However, Appellant did not know the scope and extent of the conspiracy in which Kensil and Hiatt were members, and did not know that the purpose of this conspiracy incorporated and included the manufacture of liquor in violation of law. That none of his acts by their character necessarily portrayed to him that he was dealing with others who had conspired to manufacture illegal distilled spirits. See App. pp. 17-20. Nothing appears in the record whereby he would be informed that the party or parties he dealt with in buying illegal distilled spirits were directly selling and dispensing this commodity from a distillery.

It is of course true, illegal liquor is often sold or dispensed directly from a still, wherein the parties in the unlawful enterprise sell directly to a purchaser, but, transactions involving the illegal sale of liquor do not preclude a seller of illegal liquor from acting in an entirely different capacity, whereby his status as a seller of illegal liquor has no connection with an illegal distillery.

The question presented is not whether Appellant would have purchased liquor from Hiatt and Kensil, if he had known they were connected with the manufacture of illegal liquor the question is, does the evidence adduced in this case establish that he was dealing with those connected with the manufacture of illegal distilled spirits? There is nothing in the record to show that he had such knowledge.

The Court instructed the Jury as follows—App. p. 6:

> You may find from the evidence, after a careful review of it, that there wasn't a sale but that it was a step in the overall distribution scheme by which the illicit liquor was being transferred to Haith and put into his possession for transportation for a more southernly destination.

There was no evidence in the record upon which to base the foregoing instruction included in the Court's charge to the jury.

Under the evidence the Government was not entitled to such a theory of the case.

In order for this theory to have any basis in the evidence, it is necessary to infer that the monies transferred from Haith to Hiatt was not purchase money but rather receipts collected by Haith from retail operators. There is no evidence here to indicate what disposition Haith made of the alcohol. Moreover, a theory based on transfer of possession only is totally at variance with the testimony of Hiatt that on each delivery to Leroy Haith he would tell "how many cases he had" and Haith would advise him of "how many bottles had been broken in the previous trip" and how many Hiatt "owed him". Furthermore, Hiatt always asked Haith for a specific amount of money. Such financial arrangements coupled with an actual transfer of the merchandise, characterize the entire transactions as bona fide sales.

That the transactions constituted bona fide sales, is not inconsistent with any other evidence in the case, neither is it unreasonable or improbable, but when viewed in light of all the evidence strongly indicates the illegal distilled spirits were sold outright to Haith.

Even, if the transactions did not constitute outright sales, and Haith received the illegal liquor with instructions to deliver it to some one (engaged in the retail sale of illegal liquor in a more southerly destination), it would not necessarily follow therefrom that he would know that those who transferred the liquor to him had any connections of any nature with an illicit distillery.

We submit that the record does not show that Haith had knowledge of the scope of the conspiracy, and, we maintain that the District Judge should have sustained the motion for acquittal.

We have discussed the case involving the law thereon, from the standpoint that Haith had knowledge that Kensil was involved in the first transfer of illegal distilled spirits—but in fact the record manifestly does not establish such knowledge on the part of Haith.

There is no line of demarcation existing between the cases of Leroy Haith, and that of his wife, Jacqueline Haith.

The District Judge sustained the motion for judgment of acquittal in the case of Jacqueline Haith, and we contend that by the same token, he should have sustained such motion made on behalf of Leroy Haith.

In the case of Jacqueline Haith there was one buyer and one seller, and as the agreement of the parties was an essential element of the sale, an indictment of the buyer and the seller for a conspiracy to make the sale was of doubtful validity.

The District Judge applied the above principle as ex-

pressed in *Norris* v. *U. S.*, 3rd Cir., 34 Fed. (2d) 839, and awarded judgment of acquittal in the case of Jacqueline Haith.

There is absolutely no evidence in the entire record that Haith had knowledge that Kensil was a party to the first transaction involving the transfer of illegal liquor.

The record evidences the following:

> "Q. Now, Mr. Hiatt, what did you say to Bud Haith, as you have identified him, what did he say to you on this occasion?
>
> "A. I told him how many cases of goods I had for him. He told me how many pounds of air to put in his car. And, I also told him where to meet Eddie Kensil.
>
> "Q. As a result of this conversation what, if anything did you do, and what did Mr. Haith Do?
>
> "A. Mr. Haith stayed there and I took his car and drove it to a drop and loaded it." See App. p. 19.

The District Judge in opinion says:

> "We shall first consider the Government's case against Leroy Haith. We do not agree that the evidence fails to establish that Leroy Haith had knowledge that "the sellers and or transferors" of the distilled spirits consisted of two or more members of an existing conspiracy. Hiatt told Haith at the very first meeting "where to go to meet Eddie Kensil" and later saw Haith "getting out of Eddie Kensil's car". This was no "casual and unexplained" meeting. United States v. Falcone, 311 U. S. 205, 210. In the entire context of the circumstances, the inference is irresistible that Kensil was present in connection with the transfer of the liquor and that Haith knew it." See App. p. 11.

Manifestly, the District Judge has set up a structure not built on the evidence adduced in the trial.

It appears that in all probability that Hiatt's means of transportation to Howard Johnson's Restaurant on the New Jersey Turnpike was the automobile of Eddie Kensil. That Hiatt saw him get out of this automobile when he arrived. Consequently, when Hiatt left Haith and went to the drop near Pitman, N. J. and loaded Haith's automobile with liquor, Haith merely took a seat in the automobile that Hiatt arrived in, not knowing who it belonged to.

There is not a scintilla of evidence in the entire record that Haith ever saw Kensil. If, Haith did meet Kensil, it does not follow as a consequence from the evidence adduced that anything was said whereby Haith would know that Kensil was connected with the sale of liquor or that he occupied the position of a joint transferor of the illegal distilled liquor.

Suspicious circumstances are not enough and are not sufficient to establish that Haith knew Kensil was connected with the sale of the illegal liquor. Such matter needs convincing and strict proof. The structure cannot be built on suspicion or mere speculation.

The District Court in its opinion states:

> "On arrival at a meeting place apparently prearranged between Haith and someone other than Hiatt, they exchanged vehicles." See App. p. 10.

The Court below arrives at the conclusion that the meeting between Hiatt and Haith was prearranged. Arranging a meeting between these parties would not require the act of any one else—Haith and Hiatt had known each other since June, 1959—see cross-examination of Hiatt—App. p. 27.

It is clear that *Norris* v. *United States*, 3rd Cir., 34 Fed. (2d) 839, governs the case of the Appellant as there was merely one buyer and one seller involved as the evidence does not show that the Appellant had any knowledge that Kensil was involved in the sale of the liquor.

The overt acts, alleged in the indictment, are restricted and limited to transfer of illicit liquor by Hiatt to Haith, only on those occasions when Jacqueline Haith, the wife of Leroy Haith, was present with her husband.

The overt act wherein the Government claims Kensil was present is not charged.

The transaction that took place between Hiatt and Haith, when it was claimed by the Government that Kinsil was present is not charged as an overt act. Therefore, the proof responsive to the overt acts alleged in the indictment involve one buyer and one seller, and, *Norris* v. *United States* governs.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Court below so far departed from the accepted and usual course of judicial proceedings that its judgment is manifestly erroneous and petitioner prays that a writ of certiorari be herein awarded him and that the final order of the United States Court of Appeals for the Third Circuit be reversed.

Respectfully,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 577

LEROY ALPHONSO HAITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 2–5) is reported at 295 F. 2d 489. The opinion of the district court (P. App. 10–14)[1] is not reported.

[1] The record filed in this Court includes the appendices to the briefs filed by petitioner and respondent in the Court of Appeals for the Third Circuit. These appendices will be cited respectively as "P. App." and "R. App." plus the page reference.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1961 (Pet. 2). The petition for a writ of certiorari was filed on November 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record was sufficient to show that the grand jury returned the indictment in open court.
2. Whether the indictment failed to inform petitioner with sufficient definiteness and certainty of the acts which allegedly tied him to the conspiracy to violate the liquor laws.
3. Whether the district court erred in finding the evidence sufficient to support petitioner's conviction of the conspiracy charged in the indictment.

STATEMENT

Petitioner was found guilty under count 1 of an indictment returned in the United States District Court for the Eastern District of Pennsylvania which charged petitioner and 18 other defendants with a conspiracy to violate the Internal Revenue laws relating to the manufacture, distribution and sale of distilled spirits. It was alleged that the plan and purpose of the conspiracy was (a) to engage in the business of a distiller without having given the required bond (26 U.S.C. 5601(a)(4)); (b) to possess a still without registering it (26 U.S.C. 5179(a)); (c) to make mash for distillation on premises other than an

authorized distillery (26 U.S.C. 5222(a)(1)); and (d) to transport, possess, buy, sell, and transfer distilled spirits in containers without the required tax stamps (26 U.S.C. 5205(a)(2)) (P. App. 16–17). The indictment charged that petitioner had performed the following overt acts in furtherance of the conspiracy (P. App. 17):

> (g) Approximately three times a week, between November 1, 1959 and February 9, 1960, *Leroy Haith* and *Jacqueline Haith* turned their automobile over to Lewis M. Hiatt, who took said automobile to Pittman, New Jersey, loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania, and accepted delivery of said automobile, so loaded, at points previously agreed upon by the parties.

The evidence of petitioner's participation in the conspiracy may be summarized as follows:

Hiatt, the chief prosecution witness who was named as a co-conspirator but not indicted (P. App. 16), testified that early in November 1959 he met petitioner at a Howard Johnson Restaurant on the northbound side of the New Jersey Turnpike just below the Mt. Holly and Burlington exits (P. App. 17–18). Petitioner was alone in a two-door 1959 Buick bearing Virginia license plates (P. App. 18, 19). The trunk of the car had been altered to give greater storage space (R. App. 2b–3b). Hiatt told petitioner how many cases of "goods" he had for him, and also informed him where to meet Eddie

Kensil (a co-defendant and the principal operator of the illicit distillery). Hiatt drove petitioner's Buick to the distillery "drop" at Pitman, New Jersey, where he loaded it with 20 six-gallon cases of liquor and drove it to a different Howard Johnson's located on the southbound side below Route 73 in New Jersey (P. App. 19, 23). Hiatt then got out of the Buick, put the key under the mat and walked toward Eddie Kensil's car from which he observed the petitioner getting out. Petitioner, according to Hiatt, proceeded to drive south on the New Jersey Turnpike with the load of liquor (P. App. 19–20).

The same procedure was followed for some 50 or 60 deliveries between November 1959 and February 1960. Petitioner "came up" about every other day in the same two-door Buick and in about 30 transactions his wife was with him (P. App. 20–23, 25). Petitioner or petitioner and his wife would switch cars with Hiatt. Hiatt would take their car and pick up the liquor at the drop. He would drive to a different location where he would find petitioner or, if present that day, petitioner and his wife "in the vehicle that I brought to the original place * * *" (P. App. 23). The parties would again switch cars and petitioner would leave with the liquor stowed in the oversized trunk. On two or three occasions petitioner paid Hiatt around $500 and once petitioner's wife paid this amount. Hiatt always told petitioner how many cases he had, and petitioner would report how many bottles had broken during the previous trip and were owed to him (P.

App. 23–24). There were no federal tax stamps on the jars of liquor (P. App. 26).

Motions for judgment of acquittal on grounds of the insufficiency of the evidence were made by petitioner and his wife who was also named a defendant. In a lengthy opinion reviewing the sufficiency of the evidence, the court denied petitioner's motion but granted the motion of his wife. (P. App. 10–14.)

The jury found petitioner guilty on count 1 and sentenced him to imprisonment for 3½ years and to pay a fine of $250 (P. App. 15). Petitioner appealed to the Court of Appeals for the Third Circuit alleging as grounds for reversal of his conviction the three contentions advanced in the instant petition. The court of appeals affirmed.

ARGUMENT

1. There is no merit to petitioner's attack upon the indictment on the alleged ground that the record did not show that it had been returned in open court by the grand jury (Pet. 10–13). The contention was raised for the first time in the court of appeals and properly disposed of as both untimely and without merit (Pet. 2–3).

The district court clerk's minute sheet shows that the court was in session on June 2, 1960, trying a civil case and that at 4:30 p.m. on that date the grand jury returned with 18 true bills (P. App. 28) The docket entry shows that the true bill was returned on that date (P. App. 1). On the first page of the original indictment there is a notation that it was

filed on June 2, 1960, and the last page is endorsed "a true bill" by the foreman of the grand jury (Pet. 3). The foregoing record entries are sufficient under the decided case law to show that the indictment was properly returned by the grand jury. No "set form of phraseology" is requisite for such a showing. *United States* v. *Glasser*, 116 F. 2d 690, 695 (C.A. 7), affirmed on this point although reversed on other grounds, 315 U.S. 60, 65, 66. Moreover, petitioner's right to raise this technical objection, not shown to have prejudiced him, was lost by his failure to make it at the first opportunity in the district court. Cf. *Breese* v. *United States*, 226 U.S. 1.[3]

2. There is also no substance to petitioner's attack upon the sufficiency of the indictment on the grounds that it was indefinite, did not inform him that he had joined the conspiracy and did not allege a connection between his acts and the plan of the conspirators (Pet. 13-22).[4] This contention was fully reviewed and correctly disposed of by the court of appeals which held (Pet. 3):

> We think an attack upon this indictment on the ground that it fails to tell the defendant what he is being charged with is not well taken. A reasonable interpretation of the language cer-

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[3] *Renigar* v. *United States*, 172 Fed. 646 (C.A. 4), is not in point since in that case, unlike the situation here, the facts adduced showed that the grand jury foreman entered the court room alone and delivered the indictment to the clerk when the court was not in session and the judge was conferring with attorneys in chambers (see 172 Fed. at 647).

[4] As with petitioner's first point, this claim was raised initially on appeal and is therefore not open for consideration except in very limited circumstances not shown to be present here.

> tainly charges him with being a party to the conspiracy and sets out very definitely his role in it."

Since petitioner was named as a conspirator in the indictment, it was not necessary that there be an explicit statement to the effect that he joined in the conspiracy in that portion of the charge describing his overt acts in furtherance of the conspiracy. As the court below pointed out, the language describing his overt acts specifies "very definitely" petitioner's role (Pet. 3). The indictment need not spell out the particular way in which his overt acts furthered the conspiracy; it was sufficient for the indictment to charge, as it did (P. App. 17), that the overt acts were committed in the furtherance of the conspiracy. *Frohwerk* v. *United States,* 249 U.S. 204, 209; *Marron* v. *United States,* 8 F. 2d 251, 258 (C.A. 9); *Haywood* v. *United States,* 268 Fed. 795, 805 (C.A. 7), certiorari denied, 256 U.S. 689; *Gruher* v. *United States,* 255 Fed. 474, 477 (C.A. 2). It was not necessary that the overt act itself be a criminal act. *United States* v. *Rabinowich,* 238 U.S. 78, 86; *Braverman* v. *United States,* 317 U.S. 49, 53. Neither was it required, as petitioner suggests, that the indictment allege with technical precision the elements of the offense which was the object of the conspiracy, or state such object with the detail required in an indictment for committing the substantive offense. *Wong Tai* v. *United States,* 273 U.S. 77, 81.

3. As his third point, petitioner seeks to renew in this Court a contention that the evidence was insufficient to support his conviction (Pet. 23–37). This

claim has already been heard and denied in full opinions by the district court (P. App. 10–14)* and the court of appeals (Pet. 4–5). In addition, it was rejected by the jury under instructions to which petitioner took no exception (P. App. 5). Petitioner presents no new or valid ground for this Court to grant a third judicial review of evidence three times previously found sufficient for conviction. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589–590.

This is not a case involving only one seller and one buyer so that there could be no conspiracy conviction as in *Norris* v. *United States*, 34 F. 2d 839 (C.A. 3). The jurors were correctly instructed in accordance with *Norris* that, if they found only simple sales between Hiatt and petitioner alone, petitioner would not be guilty of the conspiracy (P. App. 3). Here, the regularity of petitioner's meetings with Hiatt, the way in which delivery was made and the large quantities involved justified the inference that petitioner knew that the liquor came from an illegal distillery and was an active participant in its distribution and sale. Here there was, with respect to the buyer of an illegal commodity, the type of "informed and interested cooperation" with a "stake in the venture" which this Court, in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713, held sufficient to justify a verdict that a seller was

* The care with which the district court reviewed the evidence is attested by the fact that it granted the companion motion for acquittal filed by petitioner's wife (P. App. 14).

a co-conspirator of the buyer. See also *United States* v. *De Vasto*, 52 F. 2d 26, 30–31 (C.A. 2), certiorari denied, 284 U.S. 678; *United States* v. *Bruno*, 105 F. 2d 921, 922–923 (C.A. 2), reversed on other grounds, 308 U.S. 287; *United States* v. *Tramaglino*, 197 F. 2d 928, 930 (C.A. 2), certiorari denied, 344 U.S. 864.

Petitioner concedes that the indictment charges only one conspiracy and that it was not necessary that the evidence show that he knew the identity or number of his confederates or their precise functions or the exact source of the liquor sold or transferred to him (Pet. 26, 32, 34). Petitioner's complaint appears to be that the evidence failed to show that he knew that the liquor transferred to him was produced and manufactured by members of the conspiracy (Pet. 26). The very concessions made by petitioner appear to make such evidence unnecessary. Thus, the district court, which like the court of appeals heard and denied the same contention, ruled (P. App. 11, 13):

> Haith thus knew of an illegal combination to possess, transfer, sell, etc., untaxed spirits.
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> * * * * *
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> It was not a sine qua non that he know the exact source of the alcohol so long as that source lay within the known general design and purpose. As stated in *United States* v. *Andolschek*, 142 F. 2d 503, 507 (2d Cir. 1944), when a party to a conspiracy "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them."

As this Court said in *Blumenthal* v. *United States*, 332 U.S. 539, 557, the law permits "the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." See also *United States* v. *Sansone*, 231 F. 2d 887, 892, 893 (C.A. 2), certiorari denied, 351 U.S. 987.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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